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No. 93-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JOHN A. MORRISON, *et al.*,
Petitioners,

v.

MOBIL OIL CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the federal discovery rule, can a single injury have more than one legal cause, with each cause giving rise to a separate claim for relief which may accrue for limitations purposes at different times?

LIST OF PARTIES

Petitioners, plaintiffs-appellees, below:

John A. Morrison, Robert G. Jacobsen, Donald F. Hill, George H. Liveris, Robert A. Irwin, A.D. Bond and Ira S. Reavis, for themselves and on behalf of others similarly situated, as part of a class certified by the District Court under Fed. R. Civ. P. 23.

Respondent, defendant-appellant, below:

Mobil Oil Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, plaintiffs below, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion, denominated *Raymond v. Mobil Oil Corp.*, is reported at 7 F.3d 184 (1993) (*Raymond II*) and is reprinted in the appendix at 1a-5a.

RELATED CASES

Raymond v. Mobil Oil Corp., 983 F.2d 1528 (10th Cir.), *cert. denied*, —— U.S. ——, 114 S.Ct. 81, 126 L.Ed.2d 49 (1993) (*Raymond I*).

Christopher v. Mobil Oil Corp., 950 F.2d 1209 (5th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 68, 121 L.Ed.2d 35 (1992).

Mitchell v. Mobil Oil Corp., 896 F.2d 463 (10th Cir.), *cert. denied*, 498 U.S. 898, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990).

JURISDICTION

The Tenth Circuit's judgment in this case entered on October 6, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This petition involves the Age Discrimination in Employment Act ("ADEA"). The ADEA makes it unlawful for an employer to:

> . . . discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 623(a)(1). The ADEA statute of limitations provides for a three-year period for a civil action alleging a willful violation of ADEA. 29 U.S.C. §§ 255(a), 626(e)(1).

STATEMENT OF THE CASE

A. Factual Background of Mobil's Fraudulent Concealments.

The alleged fraudulent and age-discriminatory concealments by Mobil Oil Corporation ("Mobil") took place in 1984 when all plaintiffs were Mobil employees who were at least 55 years of age and members of the ADEA protected class.

1. *The Origins of Mobil's Strategy to Induce Age-Discriminatory Early Retirements.*

As part of their compensation, the plaintiffs earned pension benefits under an ERISA-governed pension plan ("plan"). Before July 1984, the plan allowed a retiring employee to take his or her pension either in the form of

a monthly annuity, or in a lump sum if the employee's accrued pension totalled $250,000 or if the employee's net worth, exclusive of the pension, exceeded $250,000 (the pre-1984 eligibility threshold).

Plaintiffs allege that in late 1983 Mobil first considered an increase in the eligibility threshold to induce age-discriminatory retirements. In October 1983, Mobil was advised by its attorneys that the IRS probably would not approve an increase in the eligibility threshold because the change would constitute an "impermissible preference" in favor of highly compensated employees.

By December 1983, Mobil executives were aware that a change in access to the lump sum pension benefit would induce employee retirements. In a report to the Executive Committee, Mobil's employee benefits department noted that the threat of an increase in the lump sum eligibility threshold would "accelerate early retirements" because the lump sum was approximately 40% more valuable than the alternative monthly annuity. In a supplemental report, Mobil's benefits department urged the Executive Committee to adopt a "transition plan to control accelerated retirements." What Mobil's benefits department perceived as a problem, however, Mobil's Executive Committee considered an opportunity.

2. ***Mobil's "Early Retirement" Strategy.***

Simultaneous with the benefits department's warnings about accelerated early retirements, Mobil retained Donald Alexander, former commissioner of the IRS, as its special counsel for advice as to how Mobil might raise the lump sum eligibility threshold notwithsatnding the IRS's position on "impermissible preferences" for executives. Alexander's inquiries to the IRS National Office yielded the expected response:

> [O]n an amendment increasing the lump sum hurdle rate, the probable response would not only be disapproval of any increase, but an insistence on the

> removal of the existing threshold as well. A restrictive lump sum provision, in short, is "sown with the seeds of discrimination."

Undaunted, Mobil's Executive Committee assigned company actuaries to forecast the effects of increasing the lump sum eligibility threshold from $250,000 to $450,000 and delaying the effective date of the change for six months, thus creating a "window" under which employees over the age of 55 could take the lump sum benefit under the $250,000 threshold so long as they retired within the six-month window period. Eligible employees over age 55 who chose not to exit through this window with their lump sum pension risked losing the lump sum benefit under the higher threshold. Plaintiffs were thus presented with a Hobson's choice: relinquish their jobs to preserve their lump sum or retain their employment but lose their lump sum.

Mobil's actuaries estimated that "over 1300 [employees] . . . would be subjected to substantial pressure to retire" in order not to lose the lump sum pension benefit before the window closed. In April 1984, an outside actuarial consultant prepared an extensive analysis of the proposed plan amendment. The analysis explicitly recognized that what Mobil's executives were now calling their "lump sum strategy" was, in reality, not a truly voluntary early retirement program.

3. *Mobil's July 1984 Communication to Employees Announcing an Increase in the Eligibility Threshold.*

In May 1984, Mobil executives were alerted to a new problem: the IRS's opposition to benefit "cutbacks" (even cutbacks to "optional" benefits) might become law. Mobil's employee relations departments realized that the pending legislation, eventually the Retirement Equity Act of 1984 ("REA"), would "grandfather" the $250,000 eligibility threshold. A committee of employee relations managers recommended that Mobil's executives "delay

[the] effective date [of the change in the eligibility threshold] to six months *after* IRS approves" the change, and that if the IRS does not approve the change, the "employee should be so informed."

Those recommendations notwithstanding, Mobil's Executive Committee met on June 13, 1984, before the REA became effective, and formally adopted the increase to the eligibility threshold and the window period to induce the desired "early retirements." Mobil then announced the proposed amendment and the window period to its employees, including the plaintiffs, on July 2, 1984.

In describing the threshold increase and the window period to the employees, Mobil carefully cultivated the impression that the amendment was lawful in all respects. Mobil made it clear that it had the right to amend the plan, subject to IRS approval, and that it could have amended the plan and announced the threshold increase without any window period. It also told the employees that the plan amendment was necessitated by "cost-savings" and "intervening inflation," as well as by "competitive practices" and "plan needs." Although many Mobil employees voiced their displeasure over the choice imposed by the announcement, virtually all believed that the change was legal and permissible.

It is important to note at this juncture that the essence of plaintiffs' claims lies not in the substance of the plan amendment, but in what Mobil concealed from plaintiffs about the amendment *after* the proposal was announced.

4. *Mobil's Fraudulent and Age-Discriminatory Concealments During the Window Period.*

In July 1984, two weeks after Mobil communicated the threshold increase and the window period to plaintiffs, Mobil's tax counsel submitted an "Application for Determination" letter to the IRS. Two months later, in September, the IRS agent who reviewed Mobil's lump sum amendment informed Mobil that "the $450,000 threshold

. . . would discriminate in favor of members of the prohibited group, the 'highly paid executives.' " The IRS agent declined to approve the $450,000 standard and urged referring the matter to the National Office.

Mobil did not disclose to plaintiffs that the July plan amendment, described as "routine" just three months earlier, had not been approved by the IRS. Instead, in October 1984, Mobil quietly revised the July amendment, adding the following proviso:

> The company, in its sole discretion, may waive this condition [the new $450,000 threshold] in individual cases for valid cause shown, under the claim and appeal procedures of the Plan.

In effect, applying for a waiver of the higher eligibility threshold constituted a third option for affected employees —continued employment with lump sum rights rather than early retirement. Notwithstanding the "sole discretion" language in the waiver clause, Mobil knew that waivers of the $450,000 threshold would have to be granted in sufficient numbers to insure that equal proportions of lower-paid employees and "highly paid executives" qualified for the lump sum benefit. Since virtually all Mobil's executives qualified for the lump sum benefit under the $450,000 test, Mobil knew that virtually all applications for waivers would have to be granted. For many plaintiffs, the mere possibility of a waiver would have tipped the balance in favor of keeping their jobs and not retiring prematurely.

The revised plan amendments were informally approved by the IRS in October 1984 and formally approved in November 1984. Mobil, however, concealed the waiver provision to the plan amendment from plaintiffs, who otherwise were preparing to make the Hobson's choice whether to retire during the window period. Mobil also concealed the fact that it would have to grant virtually all applications for waivers under the IRS-approved plan

amendment. In addition, Mobil concealed the fact that the amendment it did adopt was not actually "made" until September 1984, after the effective date of the REA, which meant that plaintiffs' rights to the lump sum benefit under the $250,000 threshold had been effectively "grandfathered."

In October 1984, Mobil prepared two memoranda on the same day concerning the IRS's approval of the modified amendment. The first memo, distributed to Mobil's Executive Committee, fully described the plan amendment with the waiver provision. The second memo, addressed to Mobil's employee relations managers throughout the country, made no mention of the waiver provision.

On December 14, 1984, Mobil's Executive Committee formally adopted the revised plan amendment. On December 21, 1984, Mobil notified its employees that the plan amendment announced in July had been approved by the IRS and would take effect as scheduled on February 1, 1985. This December communication implied that the IRS had approved the amendments in the form announced in July and made no mention of the waiver option which the IRS had required.

On January 1, 1985, more than 1,000 Mobil employees retired under the window program, on the average more than seven years before their normal retirement age of 65. All forfeited their highest earning years and their employment benefits, including the accrual of additional retirement benefits.

Mobil did not announce the existence of the waiver provision to any of its employees, other than top-level control group executives, before October 29, 1985—more than ten months after plaintiffs and other employees retired. Even then, Mobil did not disclose the fact that the waiver provision had been adopted during the six-month window period in 1984. Mobil's concealments were not discovered until 1988 as a result of discovery

in a related case. *See Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir. 1990).

B. Related Cases.

1. *The Mitchell Case.*

Mitchell filed his lawsuit in 1986, asserting that the plan amendment announced in July 1984 put him to an age-discriminatory choice either to keep his job and lose the lump sum benefit or to forsake his job to take the lump sum benefit. Thus, Mitchell's suit was within the ADEA limitations period triggered by the Hobson's choice which effected his constructive discharge. Mitchell also asserted claims under ERISA and state law.

In 1988, Mitchell's counsel discovered the existence and terms of the waiver option, previously concealed, and thus discovered that "early retirement" was not the only option by which Mitchell and similarly situated employees could have preserved their rights to the lump sum benefit. Although Mitchell introduced evidence of the newly discovered concealments at trial, he did not assert a separate claim predicated on those concealments; rather, he proceeded at trial on an age-discriminatory "constructive" discharge theory only.

Mitchell prevailed at trial, a seven-person jury finding a willful violation of ADEA by Mobil. On appeal, the Tenth Circuit concluded that Mitchell "did establish, as a matter of law, that he had been constructively discharged because of his age," 896 F.2d at 468, but ruled that Mitchell failed to "meet his burden of production on the issue of pretext" and therefore reversed the district court's denial of Mobil's motion for directed verdict. *Mitchell*, 896 F.2d at 473. The Tenth Circuit's opinion in *Mitchell* made no mention of the waiver provision. *See Raymond I*, 983 F.2d at 1530 n.2.

The significance of the Tenth Circuit's "business justification" analysis and its holding that Mitchell failed to show "pretext" cannot be minimized. It means that putting older employees to a Hobson's choice which constitutes a constructive injury does not, without more, violate ADEA. That rule, however, cannot apply to a claim predicated on fraud since there can be no "business justification" for fraudulent concealments and therefore no requirement that the defrauded employee show "pretext."

2. *The Christopher and Falcon Cases.*

In 1989, approximately 70 window retirees filed charges with the Equal Employment Opportunity Commission ("EEOC") and civil actions in federal court for the Eastern District of Texas. *See Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir. 1992); *Falcon v. Mobil Oil Corp.*, Civil Action No. B-89-654-CA (E.D. Tex.). The *Christopher* complaint asserted ERISA and state law claims and a single ADEA claim predicated on a "constructive" discharge theory.

In *Christopher*, Mobil moved for summary judgment on the ADEA claim in the district court, primarily on statute of limitations grounds. The district court in *Christopher* granted summary judgment on the ADEA claim, holding that it was time-barred. The *Christopher* plaintiffs appealed, and the proceedings in *Falcon* were stayed pending the outcome of the *Christopher* appeal.

As to the ADEA claim, the Fifth Circuit affirmed, holding that the plaintiffs had asserted but one ADEA claim, on a "constructive" discharge theory, and that allegations of fraudulent concealment were "superfluous" to that claim. *Christopher*, 950 F.2d at 1214-15. The "coercive choice" put to the plaintiffs by the proposed increase in the eligibility threshold was sufficient for a *prima facie* case of "constructive" discharge, thereby commencing the limitations period under ADEA when the Hob-

son's choice was first announced in July 1984. The Fifth Circuit did not address whether the plaintiffs could have stated a separate and distinct claim for a violation of ADEA predicated not on the Hobson's choice imposed by the announced July 1984 plan amendment, but rather on the concealments of the employment choice which should have been made available under the *revised* amendment made in the fall of 1984.

C. Proceedings Below.

In December 1988, soon after discovery during the *Mitchell* case of Mobil's 1984 concealments, plaintiffs filed this action. In January 1989, the plaintiffs filed two class-wide charges of age discrimination with the EEOC. The EEOC charges and the complaint asserted both a constructive discharge theory as in *Mitchell* and a separate fraudulent discharge theory.

In their Third Amended Complaint, plaintiffs dropped the "constructive" discharge ADEA claim based on the coercive choice, accepting the reasoning of the *Christopher* Court that that claim was time-barred. But plaintiffs restated their original fraud-based ADEA claim as two separate claims: one based on the fraudulent concealment of the waiver provision by which the plaintiffs could have chosen continued employment without forfeiting the lump sum benefit, and the other based on the concealment of facts from which the plaintiffs would have learned that their rights to the lump sum benefit under the $250,000 threshold had been "grandfathered" in by the REA.

In response, Mobil moved for summary judgment. Mobil argued that the district court should apply the *Christopher* limitations analysis even to claims for "fraudulent" discharge under ADEA. After briefing and argument which focused on the *Christopher* analysis, the district court held that there could be separate causes of

action for constructive discharge and for fraudulent discharge, with separate limitations periods, under ADEA. The Tenth Circuit reversed, adopting "the reasoning of the Fifth Circuit and hold[ing] as a matter of law that plaintiffs' 'fraudulent discharge' claim is barred by the ADEA statute of limitations." *Raymond II*, 7 F.3d at 186.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's opinion in this case presents an opportunity for this Court to settle a significant question under the federal discovery rule: when a claim is made for injury occasioned by fraud, does the limitations period commence upon awareness of an injury alone, or rather, upon the diligent discovery of the fraud that caused the injury? Does the limitations period on a claim for constructive injury to a federal right bar a claim of fraudulent injury to that same right, or may the fraud claim give rise to a separate limitations analysis keyed to the plaintiff's diligent discovery of the defendant's fraud?

In the particular context of this case, the question is: for purposes of the statute of limitations, is there a difference between a "constructive" discharge and a "fraudulent" discharge? The Tenth Circuit held that the difference was purely "semantic." *Raymond II*, 7 F.3d at 186. For the following reasons, petitioners beg this Court to differ:

1. In an ordinary employment discrimination case, the limitations period commences on the date when the employer's discriminatory act was done or discriminatory decision made. *Delaware State College v. Ricks*, 449 U.S. 250 (1980). The "proper focus is on the time of the discriminatory act, not the point at which the consequences of the act become painful." *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (explaining *Delaware State*). Under the federal discovery rule, however, the focus is on the time when the plaintiff knew or reasonably should

have known of the discriminatory or otherwise wrongful act. The plaintiffs here allege that the fraudulent concealment of the waiver provision and the concealment of the grandfathering effect of the REA were discriminatory acts, which the record below establishes and which the Circuit Court had to assume as true, not discovered or reasonably discoverable until 1988. The complaint was promptly filed in early 1989.

2. In *Holmberg v. Armbrecht,* 327 U.S. 392 (1946) it was observed that:

> [This Court] long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute [of limitations] does not begin to run until the fraud is discovered though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." . . . *This equitable doctrine is read into every federal statute of limitation.*

327 U.S. at 397 (citation omitted) (emphasis added). Whether by recognizing a separate claim for fraudulent injury under ADEA or by applying the doctrines of equitable tolling, appropriate here given that Mobil's conduct rose to the level of active deception, this Court should not allow the Tenth Circuit's limitations analysis, applicable to constructive injury, to defeat the federal discovery rule and thus preclude a remedy for fraudulent injury.

3. "Constructive" discharge and "fraudulent" discharge are different claims, factually and legally. As the *Mitchell* case exemplifies, a constructive discharge claim under the ADEA could fail given an adequate showing of a business justification by the employer. But an employment discrimination claim predicated on a fraud targeted only on older workers could not fail for that reason. Fraud can never be "business justified." If the elements and out-

comes of the two claims differ, how can the distinction between them be merely "semantic"?

4. Evidence of an employer's fraudulent concealment does not merely constitute "more evidence" to support a constructive discharge claim. Indeed, fraudulent concealment of information is inconsistent with, and cannot cause, constructive injury. In *Christopher,* the Fifth Circuit held that "[a] 'discharge' within the meaning of [29 U.S.C. § 623(a)(1)] may be constructive if a reasonable person in the employee's position would have felt compelled to resign under the circumstances." 950 F.2d at 1214. By definition, concealments, in and of themselves, cannot constitute a circumstance which would compel a reasonable employee to resign. An employee cannot feel compelled or coerced by what he does not know. Evidence of fraud destroys the "constructiveness" of the injury because of such evidence shows that the employee did not "feel compelled" to resign but in fact was tricked into resigning. This is the theory of fraudulent discharge argued by the plaintiffs to the Tenth Circuit, but not presented to the Fifth Circuit. *See Christopher,* 950 F.2d at 1215 (observing that plaintiffs "offered no theory under which the alleged nondisclosure is a necessary element").

5. Carried to its logical extreme, the Tenth Circuit's reasoning in *Raymond II* and the Fifth Circuit's reasoning in *Christopher* would mean that any decision by an employer that is considered adverse by older employees triggers the running of the ADEA statute of limitations as to any and all claims. This would be true even as to an age-discriminatory decision to conceal information, but for which concealment another unconcealed discriminatory decision would not have caused injury at all—*i.e.,* the plaintiffs' involuntary retirements. How can the limitations period for a first cause of action—constructive discharge—absorb the limitations period for a second cause of action—for fraud—when but for that fraud, there could not have been a first cause of action?

6. The subjective impression of age discrimination created by a Hobson's choice should not preclude a separate claim for age-discriminatory fraud. A contrary rule encourages (indeed, compels) the assertion of even the most dubious claims to prevent statutes of limitations from running against claims based on the mere speculation that an as-yet-undiscovered fraud may have played a role in the employment decision. This goes to the heart of the federal discovery rule.

7. While plaintiffs here could have earlier brought constructive discharge claims based solely on the Hobson's choice put to them by the July 1984 plan amendment, plaintiffs also could have reasonably considered that this coercive choice was not the basis for a viable claim under ADEA. Plaintiffs were led to believe, and did reasonably believe, that the July amendment was legal and permissible under ERISA. When an employer represents that its reasons for an announced pension plan amendment are not only not prohibited but are affirmatively permitted by law, a plaintiff who is unaware of discriminatory concealment may reasonably believe that he has no cause of action under *any* law. In this Court's recent opinion in *Hazen Paper Co. v. Biggens,* 507 U.S. ——, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993), the Court would:

> . . . not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that ADEA makes the two factors equivalent, . . . but in the sense that the employer may suppose a correlation between the two factors and act accordingly.

123 L.Ed.2d at 348. In cases alleging not only age-discriminatory fraud, but age-discriminatory fraud which exploits another statute (ERISA) as a shield, the statute of limitations applicable to the ADEA claim should commence when the fraud that is age-discriminatory is discovered or should have been discovered.

CONCLUSION

For the foregoing reasons, plaintiffs pray this Court to grant their petition for a writ of certiorari.

Respectfully submitted,

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